

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JARMAAL SMITH,

Plaintiff,

v.

DR. N. ADAMS, et al.,

Defendants.

No. C 10-4389 CW (PR)

ORDER REVIEWING AMENDMENTS
TO COMPLAINT; DISMISSING
CLAIMS AGAINST DEFENDANT
HAILEY; ADDRESSING PENDING
MOTIONS; SETTING DISCOVERY
AND BRIEFING SCHEDULES

(Docket nos. 9, 11, 18, 19
and 24)

INTRODUCTION

Plaintiff, a state prisoner incarcerated at Pelican Bay State Prison (PBSP), filed this pro se civil rights action pursuant to 42 U.S.C. § 1983. On October 17, 2011, the Court ordered the complaint served on several Defendants and dismissed Plaintiff's claims against two Defendants with leave to amend. On February 3, 2012, the Defendants who were served with the original complaint filed an answer.

Now pending before the Court are Plaintiff's proposed amendments to the complaint. Also pending are several procedural motions filed by Plaintiff.

DISCUSSION

A. Amended Claims

The original complaint concerns Plaintiff's allegations that he has been provided with inadequate medical care for his migraine headaches since his arrival at PBSP in December 2, 2009. Based on such allegations, Plaintiff claims deliberate indifference to his serious medical needs and retaliation by PBSP medical staff.

1. Deliberate Indifference Claim Against Defendant Hailey

In its Order reviewing the complaint, the Court summarized

1 Plaintiff's allegations of inadequate medical care as follows:

2 Here, according to Plaintiff's allegations,
3 Defendants Stone and Anders denied Plaintiff medical
4 treatment by failing to administer Plaintiff's prescribed
5 dosage of Gabapentin, and Defendant Adams and Risenhoover
6 denied Plaintiff medical treatment by failing to treat
7 Plaintiff's migraine headaches and nerve twitching.
8 Additionally, according to Plaintiff's allegations,
9 Defendants Risenhoover and Escobar denied Plaintiff
10 medical treatment by failing to review Plaintiff's
11 medical records to confirm that he had a heart condition
12 and had been advised to see a cardiologist.

13 Order at 10:27-11:8.

14 Based on such allegations, the Court found that Plaintiff
15 stated a cognizable claim for deliberate indifference to his
16 serious medical needs by Defendants Licensed Vocational Nurses
17 (LVN) B. Stone and A. Anders, Dr. N. Adams, Nurse Practitioner S.
18 Risenhoover and Correctional Officer R. Escobar.

19 The Court further found, however, that the complaint does not
20 state a claim for relief against Defendant PBSP Correctional
21 Officer Hailey, because Hailey is not linked specifically to the
22 deliberate indifference allegations in the body of the complaint.
23 Specifically, the Court explained:

24 While Plaintiff alleges that Defendant Hailey
25 informed Defendant Adams of the time remaining in
26 Plaintiff's appointment, Plaintiff has not linked
27 Defendant Hailey to his deliberate indifference claims.
28 As such, Plaintiff has failed to state a cognizable
deliberate indifference claim against Defendant Hailey.
Accordingly, Plaintiff's claim against Defendant Hailey
is DISMISSED with leave to amend. Plaintiff may reassert
his deliberate indifference claim against Defendant
Hailey in an amendment to the complaint if he can, in
good faith, allege facts demonstrating that Defendant
Hailey knew Plaintiff faced a substantial risk of serious
harm and disregarded that risk by failing to take
reasonable steps to abate it. [Citation omitted.]

Order at 12:9-20.

In his amendment to the complaint, Plaintiff alleges the

1 following with respect to Hailey's actions: During Plaintiff's
2 medical visit with Nurse Risenhoover on February 25, 2010, Hailey
3 stuck his head through the door and said, "Dr. you have 5
4 minutes." Am. Compl. at 2:3-5. Plaintiff then asked Risenhoover
5 whether she had reviewed his file. Risenhoover responded, "I
6 don't need to, migraines are not treated with Gabapentin." Id. at
7 2:8-9. Hailey again opened the door and announced that
8 Plaintiff's time was up. Id. at 2:10-12. On March 3, 2010,
9 Plaintiff filed an administrative grievance against Hailey. Id.
10 at 2:13-14.

11 Plaintiff's allegations fail to state a claim for relief
12 because they essentially are identical to his allegations against
13 Hailey in the original complaint. See Order at 7:3-7:17.
14 Plaintiff has added nothing more to link Hailey to actions that
15 even remotely resemble the type of behavior necessary to state a
16 claim for deliberate indifference to serious medical needs.
17 Accordingly, this claim against Hailey is DISMISSED without leave
18 to amend and, because this is the only claim to which Hailey is
19 linked, Hailey is no longer a Defendant in this action.

20 2. Retaliation Claim against Defendant Stone

21 In the original complaint, Plaintiff alleged the following:
22 (1) he suspected Nurse Stone of under-medicating him; (2) he
23 confronted her with this information and she became angry and
24 tried to convince him otherwise; (3) he asked for her name and
25 indicated that he would file a complaint against her; (4) she
26 retaliated against him by manipulating the doctor into changing
27 the remaining length of Plaintiff's prescription medicine from
28 thirty to seven days.

1 The Court found Plaintiff's allegations failed to state a
2 claim for retaliation for the following reasons:

3 Plaintiff alleges that, because he asked for
4 Defendant Stone's name and indicated that he would file a
5 complaint against her, she retaliated against him by
6 manipulating the doctor into changing the remaining
7 length of his Gabapentin prescription from thirty to
8 seven days. (Compl. at 16.) Plaintiff has not alleged
9 facts sufficient to support each of the elements of
10 retaliation. In addition, his conclusory allegation of
11 wrongdoing on the part of Defendant Stone -- based on her
12 manipulating the doctor -- is speculative and thus
13 insufficient to state a cognizable claim for relief.
14 Furthermore, the alleged retaliation occurred prior to
15 Plaintiff filing his grievance against Defendant Stone.
16 Thus, without proof that a grievance was filed prior to
17 the manipulation of his medication, Plaintiff cannot show
18 that this adverse action against him was because of
19 protected conduct. Plaintiff has failed to state a
20 cognizable retaliation claim against Defendant Stone.

21 Accordingly, Plaintiff's retaliation claim against
22 Defendant Stone is DISMISSED with leave to amend.
23 Plaintiff may reassert his retaliation claim against
24 Defendant Stone in an amendment to the complaint if
25 Plaintiff can, in good faith, allege that he engaged in
26 constitutionally protected conduct, that Defendant Stone
27 took adverse action against him in retaliation for the
28 protected conduct, and that Plaintiff suffered harm as a
result of the retaliation.

Order at 13:9-14:4.

Plaintiff's amended claim against Stone includes no new
factual allegations. Instead, based on the same facts set forth
above, he argues that a retaliatory inference can be drawn that
the doctor shortened his medication prescription because of
interference by Stone. For the same reasons discussed in the
Order dismissing the claim against Stone with leave to amend, the
Court finds Plaintiff's allegations against Stone fail to state a
claim for retaliation. Accordingly, this claim against Stone is
DISMISSED without leave to amend.

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1 B. Motions for Preliminary Injunction/Urging Court to Act

2 On March 25, 2011, prior to the Court's Order serving the
3 complaint on Defendants, Plaintiff filed a motion seeking
4 immediate injunctive relief to order Defendants Adams and
5 Risenhoover to provide him with medication to treat his migraine
6 headaches. Mot. for Prelim. Inj. at 1. Specifically, Plaintiff
7 claimed that Adams and Risenhoover terminated his prescription for
8 Gabapentin, which he first received on August 12, 2008, and, as a
9 result, he had experienced migraine headaches on at least thirteen
10 occasions, the most recent migraine headache occurring on February
11 21, 2011. Id. at 5. Thereafter, on June 10, 2011, Plaintiff
12 filed a motion urging the Court to take action on his request for
13 preliminary injunctive relief.

14 In the Order of Service, the Court directed Adams and
15 Risenhoover to file a response to Plaintiff's motion on the same
16 due date for the answer to the complaint. On February 3, 2012,
17 Defendants filed a timely answer but did not file a response to
18 Plaintiff's motion.

19 As it has been eleven months since Plaintiff filed his request
20 for preliminary injunctive relief, Defendants only recently have
21 been served and made an appearance, and it is possible that, in
22 the interim, Plaintiff's circumstances have changed such that his
23 request has been rendered moot or is subject to modification, the
24 Court DENIES Plaintiff's motion without prejudice to his filing
25 and serving on Defendant's counsel a renewed motion for a
26 preliminary injunction if he is of the good-faith belief that he
27 still requires preliminary injunctive relief.

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1 C. Motions for Revised Scheduling Order/Discovery Order

2 1. Revised Scheduling Order

3 Plaintiff moves the Court to revise the schedule set for
4 seeking extensions of filing deadlines in this action.

5 In the Order of Service, the Court directed that any motion
6 for an extension of time must be filed no later than fifteen days
7 prior to the deadline sought to be extended. Plaintiff, however,
8 expresses concern that certain photocopying policies at PBSP might
9 prevent him from knowing fifteen days prior to a filing deadline
10 whether his documents can be filed timely. Consequently,
11 Plaintiff requests that the Court change the filing deadline for
12 requesting an extension of time to five days prior to the deadline
13 sought to be extended.

14 In the interest of efficiently managing the progress of this
15 case, Plaintiff's request to modify the deadline to file a request
16 for an extension of time is DENIED. But, if Plaintiff learns
17 after the fifteen-day deadline has passed that his timely filing
18 of papers will be delayed due to the above policy, he may file a
19 belated request for extension of time, together with a signed
20 declaration stating the reasons therefor.

21 Plaintiff also moves for an extension of the ninety day
22 deadline for Defendants to file their motion for summary judgment.
23 Defendants do not oppose. The Court denies this motion without
24 prejudice, although the Court sets out a new briefing schedule
25 below. If Defendants have good cause to seek an extension, they
26 may do so. If Defendants file their motion and Plaintiff has good
27 cause to seek an extension of his time to oppose, he may do so at
28 that time.

2. Deposition of Defendant Adams

Plaintiff moves for a Court order allowing him to conduct a non-stenographic deposition of Defendant Adams. Plaintiff's request is premature, however, because there is no evidence in the record to suggest that Plaintiff has addressed this matter with Defendant's counsel before asking the Court to intervene, or that the parties have made a good faith effort to meet and confer to attempt to resolve any discovery dispute.¹ Accordingly, Plaintiff's motion is DENIED without prejudice.² The parties shall comply with the discovery schedule set forth in the Conclusion of this Order.

D. Defendant Anders

Service has been ineffective on Defendant Anders. Specifically, the Court has been informed that the Litigation

¹The district court generally is not involved in the discovery process and only becomes involved when there is a dispute between the parties about discovery responses, which normally are exchanged between the parties without any copy sent to the court. See Fed. R. Civ. P. 5(d). Before filing any motion to compel discovery, the parties must make a good faith effort to meet and confer to attempt to resolve any discovery dispute, as is required by Civil Local Rule 37-1. When a party is incarcerated, the parties may meet and confer via written communication.

²Moreover, the Court notes that Plaintiff's right to discovery can be accommodated by written depositions conducted pursuant to Rule 31. Under this rule, Plaintiff may propound in written form the very same questions he would have asked orally. As with oral depositions, parties as well as non-parties may be examined by way of written depositions. Fed. R. Civ. P. 31(a)(1). Typically, a deponent answers written deposition questions orally, in the presence of a court officer. See Fed. R. Civ. P. 31(b). In the interest of justice, however, if Plaintiff uses the written deposition procedure, the Court will modify the procedure to allow the deponents to provide written answers to the written deposition questions. This procedure will also resolve the issue of taking the testimony under oath, for the witnesses must verify the written responses (just as answers to written interrogatories are verified). Consequently, appointment of a deposition officer authorized to administer oaths would not be required.

1 Coordinator at PBSP has no record of Anders ever having been
2 employed at PBSP. Docket no. 16.

3 Pursuant to Fed. R. Civ. P. 4(m), if a complaint is not served
4 within 120 days from the filing of the complaint, it may be
5 dismissed without prejudice for failure of service. Plaintiff is
6 responsible for providing the Court with current addresses for all
7 Defendants so that service can be accomplished. See Walker v.
8 Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994); Sellers v. United
9 States, 902 F.2d 598, 603 (7th Cir. 1990). Accordingly, and good
10 cause appearing, Plaintiff, as set forth in the Conclusion of this
11 Order, shall provide the Court with the current address of
12 Defendant Anders or face dismissal of all claims against Defendant
13 Anders.

14 CONCLUSION

15 For the foregoing reasons, the Court orders as follows:

16 1. Plaintiff's Eighth Amendment claim against Defendant
17 Hailey for deliberate indifference to serious medical needs is
18 DISMISSED without leave to amend. Hailey is no longer a Defendant
19 in this action.

20 2. Plaintiff's First Amendment claim against Defendant
21 Stone for retaliation is DISMISSED without leave to amend.

22 3. Plaintiff's motion for a preliminary injunction and
23 motion urging the Court to act are DENIED without prejudice.

24 4. Plaintiff's requests to revise the scheduling order are
25 DENIED without prejudice.

26 5. No later than thirty days from the date of this Order,
27 Plaintiff must provide the Court with the current address of
28 Defendant Anders, at which point service on Anders shall be

1 attempted for the second time. If service fails, or if Plaintiff
2 fails to provide a current address for Anders, all claims against
3 Anders will be dismissed.

4 6. The parties shall abide by the following discovery and
5 briefing schedules:

6 a. Discovery

7 No later than sixty days from the date of this Order,
8 Plaintiff and Defendants must propound any written discovery
9 requests they wish to make and must conduct any oral depositions.
10 No further Court order under Federal Rule of Civil Procedure
11 30(a)(2) or Civil Local Rule 16-1 is required before the parties
12 may conduct discovery.

13 All discovery must be completed no later than ninety days
14 from the date of this Order.

15 b. Summary Judgment

16 Defendants' motion for summary judgment shall be filed and
17 served on Plaintiff no later than one-hundred and twenty days from
18 the date of this Order.


19 Plaintiff's opposition to the motion for summary judgment
20 must be filed and served on Defendants' counsel no later than
21 thirty days from the date Plaintiff is served with such motion.

22 Defendants shall file a reply brief in support of the motion
23 no later than fourteen days from the date they are served with
24 Plaintiff's opposition.

25 This Order terminates Docket nos. 9, 11, 18, 19 and 24.

26 IT IS SO ORDERED.

27 DATED: 3/8/2012

28 
CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE